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Intellectual Property Monopolies: Towards a New Mercantilism?

Antoine DOLCEROCCA*

Abstract

The agreement on Trade-Related Aspects of Intellectual Property (TRIPs), signed within the GATT framework in 1994, set the international standards and objectives for the protection of intellectual property. Although the agreement was very favorable to western intellectual property oriented firms, the few concessions to developing countries, such as a ten-years delay to implement harsher intellectual property regulations, left some core country corporations dissatisfied. Indeed, as soon as the TRIPs agreement was signed, intellectual property firms, along with and via their respective states, started pushing for harsher intellectual property legislations in bilateral Free Trade Agreements, thus bypassing global regulations. Drawing from the debate on the state and globalization, as well as the question on the relation between intellectual property and capital accumulation, this paper exposes the new collusions between state and capital that rendered possible the emergence of strong intellectual property protection legislations virtually all over the globe, and proposes to interpret that evolution as a signal telling of the new functioning of the world economy. The author makes the case that one can define the current intellectual property regime as a mercantilist system in which states, far from losing power against the growing internationalization of economic regulations, put their capacities in service of “their” intellectual property-intensive corporations. In conclusion, the author suggests a further research agenda in which intellectual property issues can provide a window into our understanding of current trends in the workings of the world economy.

Keywords: Intellectual Property, State and Globalization, Monopoly Rent, Mercantilism, Free Trade Agreements.

Fikri Mülkiyet Tekelleri: Yeni Bir Merkantilizm mi?

Öz

1994’te Gümrük Tarifeleri ve Ticaret Genel Anlaşması (GATT) çerçevesinde imzalanan Ticaretle Bağlantılı Fikri Mülkiyet Hakları Anlaşması (TRIPs) fikri mülkiyetin korunmasıyla ilgili uluslararası standart ve hedefleri ortaya koyar. Bu anlaşma fikri mülkiyet hakları odaklı şirketlerinin lehine olmasına

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rağmen, ağır hükümler içeren fikri mülkiyet düzenlemelerinin on yıl ertelenmesi gibi gelişmekte olan ülkelere tanınan az sayıdaki taviz merkez ülkelerindeki bazı şirketleri memnun etmemiştir. Bu nedenle de fikri mülkiyet şirketleri, Ticaretle Bağlantılı Fikri Mülkiyet Hakları Anlaşması imzalanır imzalanmaz, bulundukları ülkeler kanalıyla küresel düzenlemeleri atlatarak Serbest Ticaret Anlaşmaları'yla daha sert hükümler içeren fikri mülkiyet düzenlemeleri için bastırmaya başladılar. Fikri mülkiyet ve sermaye birikimi arasındaki ilişkinin yanı sıra devlet ve küreselleşme üzerindeki tartışmalardan yola çıkarak, bu makale güçlü fikri mülkiyet hakkı mevzuatlarını tüm dünyada mümkün kılan devlet ve sermaye arasındaki ortaklıkları ortaya çıkaracak ve bu evrimin dünya ekonomisinin yeni işleyişi hakkında bir sinyal olarak yorumlamayı önerecektir. Yazar, mevcut fikri mülkiyet rejimini, ekonomik düzenlemelerin giderek artan uluslararasılaşmasına karşısında güç kaybetmekten uzak olan devlet kapasitelerini, fikri mülkiyetin yoğunlaştığı şirketlerin yararına kullandıkları bir merkantilist sistem olarak tanımlanabileceğini iddia etmektedir. Sonuç olarak, yazar fikri mülkiyet konularının dünya ekonomisinin işleyişindeki mevcut eğilimleri anlamada önemli bir fırsat olduğuna vurgu yaparak, bu paralelde bir araştırma gündemi önermektedir.

Anahtar kelimeler: Fikri Mülkiyet, Devlet ve Küreselleşme, Tekelci Rant, Merkantilizm, Serbest Ticaret Anlaşmaları

Introduction

The rise of intellectual property (IP) regulations in the last thirty years constitutes a major change in the functioning of the world-economy, to the point that many compare it to the enclosures of the land in England. Indeed, James Boyle had already compared today's "enclosure" of ideas and knowledge through the invention of the concept of intellectual property rights and the incremental development of their regulation with that of the land in England. He argues that this second enclosure movement might be just as important as the first one turned out to be:

"[T]he new state-created property rights may be 'intellectual' rather than 'real' but [...] things that were formerly thought of as commons, or as 'uncommodifiable', or outside the market altogether, are being covered with new, or newly extended, property rights". (Boyle 2008, 45)

This seemingly never-ending expansion of the realm of property, needless to say, has immediate and dramatic consequences, such as inaccessible healthcare for poorer patients (as the HIV/AIDS crisis dramatically demonstrated in Africa at the end of the 1990s), and the privatization of agricultural seeds, cultural goods, software, information and knowledge in its broadest sense.

The 1970s marked a turning point in the capitalist regime of accumulation, with the combined end of Fordism, the weakening of industrial capital and the corresponding rise of financial capital as the leading element in the process of accumulation of capital. The success of Fordism in the 1960s was such that corporate profits shrank, hence challenging corporate investment capacities. In a situation with stocks of unsold goods accumulating, corporations increasingly favored making financial investment (profitable in the short term) instead of productive investment

whose profitability, in such economic configuration lied solely in the medium to long term. This rise of financial capital came together with processes of commodification (mostly through privatizations, which brought monopolized public goods and services into the market, often in the form of private monopoly or oligopoly) and accumulation by dispossession,¹ that were both responses to the crisis of overaccumulation that paralyzed the economy.

Indeed, a process of intense commodification of knowledge occurred from the end of the 1970s onwards – through the progressive establishment of a legislation creating and protecting intellectual property. Of course, IP in the sense of authorship existed much before 1979. One can retrace its emergence to 16th century Europe with the rise of the concept of authorship. I am referring here to IP as an institution that draws on the concept of authorship in order to establish a regime creating a new type of private property. This is an important as well as paradigmatic process of the structural crisis that extended from the 1970s until today. Indeed, not only was the process of accumulation by dispossession of knowledge – through the global enforcement of intellectual property “rights”, or intellectual property *monopolies* – a means to avoid the declining tendency of the profit rate, but it was also a central axis of the US policy that consisted in redefining and adapting its hegemony on the structural crisis of the 1970s, and therefore a way to counteract the decline of American hegemony.

The agreement on the Trade-Related Aspects of Intellectual Property (TRIPs), signed within the General Agreement on Tariffs and Trade (GATT) (which then became the World Trade Organization) framework in 1994, was a watershed and set the international standards and objectives for the protection of intellectual property. However, most IP firms argued that the TRIPs contained too many concessions to countries of the South because of the very structure of the WTO. The WTO are indeed backed with the idea of globalism, which entails the notion of global governance, in which states can formally negotiate on an equal footing and can take decisions collectively – and unanimously – which would apply to all members. In practice, if some states can take relatively independent decisions, most are under the pressure of core countries or regional powers, either through diplomatic or economic blackmail (Foreign Direct Investments, etc....). In such conditions, the interests of core countries usually prevail in the WTO. However in the case of the TRIPs, although the agreement was very favorable to western IP oriented firms, the few concessions obtained by the South, such as the ten-years delay to implement harsher IP regulations, left some Northern corporations unsatisfied. Indeed IP firms, along with and via their respective states, started lobbying for harsher IP legislations in bilateral Free Trade Agreements (FTAs), thus bypassing global regulations. With the reemergence of the FTAs, core countries sought to undermine the construction of a global governance, and return to a more Westphalian conception of international relations. In this case, core countries started initiating bilateral negotiations with peripheral countries, in which they can effectively exert more pressure and hence obtain more advantageous conditions than under global negotiation frameworks. The Anti-Counterfeiting Trade Agreement (ACTA) signed in 2011 but not yet

1 The term was coined by David Harvey and designates the process by which capital appropriates the commons.

ratified by a sufficient number of countries is until now the last stage of the construction of an international IP legislation. It consists in a radicalization of the negotiation process, in which only wealthier countries are invited.

In a first part, this article gives evidence that the emergence of global IP regulation was very much the expression of a collusion between core states (primarily the United States) and a few corporations whose profits depended on strict IP rights enforcement. Then, through a brief discussion on the political economy of IP monopolies, I examine the relevance and adequacy of concepts such as imperialism, monopoly rent and primitive accumulation in the analysis of the role of IP in the processes of capital accumulation. Finally, in a last section, I propose that we examine the recent shift in the configuration of the world-economy through the notion of “new mercantilism”, which refers to the emergence of a new compromise in the international economic regime approximately since 1994 and the signature of the TRIPs, in which countries of the North and their corporations compete for monopoly-rents extracted through IP.

Globalization and the Making of International Intellectual Property Regime

This section briefly retraces the history of the construction of the notion of intellectual property and of the institutions whose aim is to organize, legitimize and enforce intellectual property monopolies in the last forty years. The institutional history of intellectual property protection can be divided into two areas: in a first era, from the 1970s until the end of the 1990s, western states and IP-intensive firms lobbied for a greater integration of IP protection at a global level, leading to the rapid construction of a set of global IP regulations; in a second time, the limits of global institutional negotiations – influenced by growing concerns over public health and access to medicine first, and then over individual freedom and access to knowledge and information – led IP-intensive firms and states to seek other ways to implement stricter IP protection, chiefly through FTAs.

States, Corporations and Global Institutions in the Construction of Intellectual Property Protection: 1979 – 1990s

It is only in 1979 that IP began to be considered in international negotiations. In most countries, pharmaceuticals were not considered “normal commodities” and were subjected to specific rules. Even where there were strong legal traditions protecting IP rights, the recognition of such rights for pharmaceutical products was often subject to special treatment. Many countries treated medicines as public goods and either did not grant patent protection to pharmaceuticals at all or limited intellectual property protection to the processes by which the drugs were produced (Klug, 2008:211). Indeed, IP protection was not an issue in many countries in the 1970s. Contrasting this situation to the highly regulated and institutionalized international protection of pharmaceuticals hardly fifteen years later underlines the extent and the pace of the change operated in international law following an intense lobbying campaign. In fact, before the issue was put on the agenda of the Uruguay Round of trade talks in 1986, approximately forty states did not issue product patents

for pharmaceuticals, leading in some countries to a proliferation of copies of patented drugs. In 1970, the members of the World Intellectual Property Organization (WIPO) adopted the Patent Cooperation Treaty, which increased the organization's capacity to promote the protection of intellectual property by providing technical support services to national patent offices. However the pharmaceutical industry continued to complain about commercial losses they attributed to the weakness of patent protection, particularly in newly industrialized countries.

"For the pharmaceutical industry, the goal thus became the establishment of a minimum standard of patent protection allowing the increasingly multinational corporations that dominate the industry to operate in a single global market". (Klug, 2008:211)

What these corporations proposed was that "intellectual property regulation [should be] based on the concepts of protection and exclusion rather than dissemination and competition" (Sell, 2002:171). The collusion between these corporations and the external capacities of the United States' apparatus allowed the implementation of a very efficient strategy that aimed at bolstering the profit rate of US IP-intensive firms. Hence the creation of global IP regulations – far from being a process exterior to the state and out of its control – was primarily orchestrated by IP-intensive corporations via the United States Trade Representative (USTR) as well as other state institutions in the EU and Japan.

"Globalization is often the by-product of [states promoting the internationalization strategies of their corporations,²] and sometimes in the process 'internationalizing' state capacities. However, because state capacities differ, so [does] the capacity to exploit the opportunities of international economic change." (Weiss, 1998:4)

In the case of intellectual property, the difference in state capacity played a major role in the negotiations of the TRIPs agreement and the subsequent profits strong and weak states (and their corporations) could get from this new framework. American pharmaceutical companies played a crucial role in the promotion of the TRIPs agreement and they pursued lobbying at three levels: (1) on a multilateral level, through international organizations, particularly the WIPO and the GATT rounds, where it advocated that intellectual property protection was an integral part of the negotiations on trade; (2) at a bilateral level, the US government was pressuring its third world trade partners to improve their standards on intellectual property protection using access to their huge market as a bargaining chip; (3) at a domestic level, through fostering changes in US law that would "both enable and require the United States Trade Representative (USTR) – which is a governmental agency in charge of coordinating trade policy with the US government, and of leading bilateral and multilateral trade negotiations – to monitor the level of protection of US intellectual property granted in each country, and take retaliatory measures if US firms or citizens were deemed "not adequately protected".

The major achievement of the USTR was the last amendment to the Trade Act in 1988, which created a "priority watch list" and a "watch list" of countries to be updated by the USTR, and

2 Emphasis added.

which required it to take retaliatory measures, even if these were contrary to US international commitments for trade. Hence, in this case, “the corporations managed to use the law to bring the vast resources of the US government to bear on their particular concerns.” (Klug, 2008:213) This is another illustration that, in agreement with Block (2008) or Evans (1997) argument, liberalization and neoliberalism do not actually aim to shrink the state, as it has often been argued, but rather aim to use state resources for different purposes, namely corporate profit instead of welfare:

“As an economy produces more ideas, authoritative enforcement of property rights becomes both more difficult and more critical to profitability. In a global economy this requires an active, competent state that is able to secure the compliance of other states with its rules. In short, the most privileged economic actors in a global information economy (that is, global companies like Disney or Microsoft whose assets take the form of ideas) do not need weaker states; they need stronger ones, or at least states that are more sophisticated and active enforcers than the traditional “night watchman state.” (Evans, 1997:78)

And indeed, Sell (2002) gives us a very good illustration of this alliance between strong states and corporations with the lobbying of IP-intensive firms. She writes that in the late 1970s private sector activists initially sought government help in pressuring foreign government to adopt and enforce more stringent intellectual property protection. “They sought, and won, changes in the US domestic law and urged the government to get tough on violators of US-held intellectual property rights. They were encouraged by the reinforced role of the USTR and its sympathetic stance towards industry concerns” (Sell, 2002:174)

This strategy quickly led to the conclusion of several bilateral agreements that included strong (US standards) IP protection clauses: South Korea in 1987, Chile in 1990 and Thailand in 1992. These examples clearly show the ways in which the collusion of state and corporations allowed local, bilateral and multilateral actions in order to foster intellectual property rights protection: the domestic lobbying of US corporations led to (1) the transformation of US legislation on IP, (2) bilateral pressure on trading partners from the USTR, (3) the conclusion of the TRIPs Agreement signature in Marrakech in April 1994 (Zeller, 2008). Although the role of the United States was essential in the process that led to the TRIPs, the agreement would have certainly never come into being without the strong support of other Northern countries. Indeed the lobbying of a transnational corporate alliance of American but also European and Japanese IP-intensive firms – although exercised in a different manner than the more direct lobbying of US firms – was necessary to win the support of other Northern countries in the Uruguay round negotiations (Matthews, 2002).

The TRIPs and the Demise of Globalism

As the first chapter of the construction of intellectual property comes to a climactic end with the signature of the TRIPs agreement and its plethora of restrictive IP regulations, the very institutions that allowed this agreement to exist – mainly the newly created WTO – soon started to lose ground both among civil society concerned with the loss of a number of benefits and freedom this implied, and among IP-intensive corporations whose owners considered that this

agreement, although a remarkable success for them, was not ambitious enough and took the interests of developing countries too much into account. In this part, I pursue our examination of the history of IP regulations as it related to the debate on the state and globalization, and the literature of the sociology of IP, which looks at intellectual property from a perspective of human rights and civil liberties.

Until the end of the 1990s and the beginning of the 21st century, the hypothesis of declining state powers with nation states placed under the growing control of a global governance organized by institutions such as the WTO or the International Monetary Fund (IMF) could still be reasonably sustained. However this trend reversed quite sharply from the end of the 1990s onward. The WTO was to play an essential role as the main global institution of this global governance. Indeed, because it is less coherent ideologically than the IMF, the WTO is a more flexible institution, whose decision mechanisms should encourage all countries to participate: its rule of formal equality between countries, the fact that WTO regulations and rulings apply to all countries indifferently (as opposed to the IMF whose regulations applied – at least until very recently – only to developing countries). As Chorev and Babb (2009) argued, the WTO regulations are formally independent from western states and it allows for a greater leverage from Southern countries. Finally, the WTO's aim remained that of the GATT, i.e. the progressive reduction of tariffs and other trade barriers, leading to a more thorough integration of the world economy and favors a deepening of the process of globalization. All these features should make of the WTO the global institution par excellence, however in practice the rule of formal equality between states did not prevent the United States, other strong states and powerful corporations from becoming the effective leaders of trade negotiations, as the TRIPs agreement and its aftermath demonstrate.

The TRIPs concerns all intellectual property rights (patents, trademarks, copyrights and trade secrets) and incorporates the Paris and Berne conventions of 1883 and 1886 (as well as their later modifications), while vastly extending the reach of IP: copyrights are extended to computer software, databases and sound recordings, patents can concern nearly anything except larger forms of animal life (a patent on a bacteria was recently approved by the US Supreme Court, which calls for a new expansion of the frontier of IP towards all animal life in a relatively close future) and are granted for 20 years. As Susan Sell states, proponents of TRIPs helped to devise an enforcement mechanism linking intellectual property protection to trade leverage in order to compel developing countries to cave in. TRIPs conflicts can be settled through the WTO conflict settlement mechanism, which is based on the principle of retaliatory trade sanctions.

Besides, the TRIPs substantially changed the international intellectual property regime by introducing the principle of minimum intellectual property standards. In effect, this principle means that any intellectual property agreement negotiated subsequent to TRIPs among and/or involving WTO members can only create higher standards – commonly known as “TRIPs-plus”.³ However, hardly two years after the TRIPS agreement was finalized, the discovery of the

3 The main requirements of TRIPs-plus were “pipeline protection”, the end of the 10-year grace period, and forbidding “parallel import”.

tri-therapy treatment against the HIV/AIDS epidemics, as well as renewed activism against malaria and tuberculosis suddenly changed the rules of the game and, according to Wallerstein (2006), by 2001 the Washington Consensus no longer seemed so binding on the countries of the South. Both negotiations within the WTO, which the Bush Administration sought to revive, and Washington's bid to create a Free Trade Area of the Americas (FTAA) ran into a roadblock set up by the Brazilians and other governments of the South. The Cancún meeting of the WTO in 2003 witnessed the formation of the G20+, in which Brazil joined forces with South Africa, India and China to be able to negotiate with the US and Europe. "The basic position of the G20 was that if the South was to open its frontiers further to trade and financial flows from the North and protect the intellectual property rights of firms of the North, the North had in turn to open its frontiers further to trade flows from the South in such branches as textiles and agricultural products" (Wallerstein, 2006:91).

The resistance against pharmaceutical patenting is the result of a two-fold mobilization: grass-root movements which participated in the rise of a global consciousness of the problems implied by the TRIPs concerning access to treatment in developing countries;⁴ and, on the global scale, the concerted demand of developing countries that a "public health exception" be added to the TRIPs dispositions, and which was finally concretized in the Doha Declaration on Public Health. The real turning point in intellectual property protection negotiation was certainly the Anthrax crisis, during which both Canadian and American governments – which were otherwise the most virulent opponents to compulsory licensing or to any broad public health exception – threatened to use compulsory licensing to increase the production and reduce the price of Cipro (patented and owned by Bayer), the only drug that could cure an Anthrax infection. Given the generalized fear that a massive bio-terrorist attack was under preparation, Bayer immediately accepted to increase its production and to provide large quantities of Cipro at a much lower price, therefore dissuading the US government to use compulsory licensing. However, the threats from Canada and the US were not forgotten by developing countries, and the US finally had to accept the 2001 Doha Declaration on Public Health and the institutionalization of the 'public health exception' (Klug, 2008).

Since the emergence of the G20+ agenda at Cancún, the dispute between North and South has not been settled and the Doha round of negotiation has been stalled. Faced with such intense resistance at the global level of negotiation, Northern IP-intensive states and corporations started to push in favor of bilateral agreements (EU-South Korea; EU-India; US-Columbia; US-Morocco; etc.). Those FTAs always contains TRIPs+ standards, sometimes extending copyrights up to 70 years after the author's death (in the EU-South Korea agreement).

Hence, the co-optation of the WTO by northern states and corporations did not mean that there could be some unintended outcomes in negotiations.⁵ Although the TRIPs represent a

4 Anti-retroviral medicines against HIV are to be taken for life and are extremely expensive, although their production costs virtually nothing.

5 See most notably the 2001 Doha Declaration on Public Health.

breakthrough for global IP regulation and western IP-intensive firms, they are also a symbol of the limits of negotiations at a global level and mark the beginning of a new pattern in IP or other trade negotiations, based on bilateral trade agreement and secret negotiations open exclusively to richer states.

Intellectual Property, Imperialism and Monopoly Rent

It is only with the financialization of the economy that a patent and copyright market could become sustainable. With the over-accumulation crisis of the 1970s onward, surplus started to be diverted on financial markets, with patents and copyrights playing an increasing role in the determination of the value of financial assets, hence sustaining the very process of patentization of the world and reinforcing the need for strong protection. This development of intellectual property did not take place randomly, but in the midst of a period of decline of corporate profit and crisis of overaccumulation. IP- based products, however present a rate of profit that simply following the extent of the distribution of the product:

“Since the cost of reproducing an idea is essentially zero, returns increase indefinitely with the scope of the market. In an economy of “ideas” subject to increasing returns rather than “things” subject to decreasing ones, the distribution of income and profits is especially dependent on appropriability. The magnitude of returns to an idea does not flow from a logic of marginal production costs in a meaningful sense of the term, but it does depend on authoritative decisions, like the determination of the duration of copyright and patent” (Evans, 1997:77)

Hence, in an economy marked by decreasing returns and an accelerated fall of the rate of profit at the beginning of the 1970s, the constitution of monopolies on intellectual property was an attractive solution to boost corporate profits for firms like Pfizer, IBM, or later Microsoft through the appropriation of rent-bearing capital, in this instance, intellectual property.

In the current period we have seen a shift in emphasis from accumulation through expanded reproduction and surplus-value circuits to accumulation through dispossession. This new process of accumulation of capital arises when the former capital equilibrium has been broken in favor of older accumulation forms, which now reappear under new models, which Harvey refers to as “accumulation through dispossession”, and helps solving overaccumulation problems:

“Overaccumulation is a condition where surpluses of capital (perhaps accompanied by surpluses of labour) lie idle with no profitable outlets in sight. The operative term here, however, is the capital surplus. What accumulation by dispossession does is to release a set of assets (including labour power) at very low (and in some instances zero) cost. Overaccumulated capital can seize hold of such assets and immediately turn them to profitable use. In the case of primitive accumulation as Marx described it, this entailed taking land, say, enclosing it, and expelling a resident population to create a landless proletariat, and then releasing the land into the privatized mainstream of capital accumulation.” (Harvey, 2003:149)

In the case of intellectual property, this process entails the appropriation through patents and copyrights of state-financed medical research or indigenous knowledge on medicines, etc. Accumulation by dispossession, Harvey argues, became more obvious after 1973. This was partly an attempt to compensate for the chronic problems of overaccumulation arising within expanded reproduction. The primary vehicle for this development was financialization and the organization, largely under the lead of the United States, of an international financial system that could, from time to time, visit anything from mild to savage bouts of devaluation and accumulation by dispossession on certain sectors or even territories. The privatization and commodification of knowledge is one such expansion of capitalism.

The main way its owners can make use of this newly captured intellectual property (under the form of patents, copyrights, etc.) is through rent extraction. Hence this shift is also one from surplus-value-based economy to one of rent-based incomes. Drawing on Marx' analysis of landed property, Zeller argues that just as landed private property titles convey a monopoly over a definite part of the world, intellectual property titles "convey a monopoly over immaterial 'particular portions of the globe'". Indeed, in the new regime of intellectual property, property titles guaranteed by patents have evolved into rent-providing financial asset:

"Due to neo-liberal politics, financial capital has been able to extend its operating range beyond production. It transforms social reproduction into instruments of valorization. The property monopolies on intellectual activities and biological forms of life substantially extend rent-like appropriation of value and wealth." (Zeller, 2008:95)

While the price of land is nothing but capitalized and thus anticipated rent, the price of monopolized knowledge or information "corresponds to the expected licensing revenues in the case of an out-licensing of the patent right" (Zeller, 2008:97). However, unlike land, knowledge in general is easily reproducible and therefore difficult to protect as a property, in order to secure a rent. Indeed, "only the artificial creation of a monopoly in the form of intellectual property titles allows information to be traded". Owners of intellectual property titles can perceive monopoly rent in two main ways: they can either sell the information by giving right of licensing, or they can draw rent from the products they manufacture thanks to the commercialization of monopolized knowledge.

The obvious fragility of intellectual property titles – due to their immateriality – should lead us to emphasize the importance of the role of the state in the enforcement of these intellectual property monopolies. This statement would hence not be complete without emphasizing the centrality of the role of the state in processes of rent exploitation. Block's fundamental article on "the roles of the state in the economy" is central to Harvey's argument that accumulation by dispossession relies on state apparatus:

"For all of this [accumulation by dispossession] to occur required not only financialization and freer trade, but a radically different approach to how state power, always a major player in accumulation by dispossession, should be deployed. The rise of neo-liberal theory and its associated politics of privatization symbolized much of what this shift was about." (Harvey, 2003:156)

This analysis leads us to our third section, in which we attempt to define a research agenda for a critical political economy of intellectual property, based on the observation that the current regulatory IP system can both be better understood by analyzing it through the lens of new imperialism and mercantilism theories, and provide insight on the evolution of the functioning of the world economy.

Reintroducing the Role of the State and Class Struggle into the Critical Political Economy of Intellectual Property

It appears from what precedes that while one could still expect, until the turn of the century, a continued deepening of the process of globalization, some countries started instead to subvert or avoid altogether these institutions in order to serve their national interest and compete on a global scale. The emergence of this new political capitalism is best illustrated by the triumph of intellectual property monopolies and the considerable amount of rent they provide to core countries. In this new mercantilism, the accumulation regime of core countries depends very much on how much rent their corporations are able to capture. Hence I argue that core countries are literally trying to steal rent from each other and to ensure that the rents “their” firms already enjoy be secured. The harsh IP policies they promote and implement assume that the international economic system is a zero-sum game in which any loss inflicted on one directly profits the other, which echoes mercantilists theories. Meanwhile developing countries, who have a strong generic medicine industry such as India or Brazil and/or whose comparative advantage does not rely on IP yet, such as China, are trying to prevent the global institutionalization of this system of accumulation.

This novel configuration of the world economy as played out in intellectual property can lead to a number of readings and conclusion regarding the evolution and the working of the world economy, which I will detail in this section. The four main hypotheses that one can discern are the following: a) a US led imperialism that ensures the reproduction of the capitalist economy and high levels of corporate profits in vassal states; b) a transnational capitalist class building a global imperialist state that favors corporate interests worldwide; c) a mercantilist system whereby each state strives to ensure ideal conditions for national corporate profits; d) an imperialist system in which the current reconfiguration of world capitalism only reproduces and exacerbates the North/South divide.

American-led Imperialism and the Role of the State

The first interpretation that can be drawn from the recent evolution of global IP regulation is that of an American “informal empire” whereby the institutions of the United States and its military, on behalf and sometimes with the help of satellite states, are promoting the emergence of a global institutional setting that can provide favorable conditions for the rise of western corporate profit rate (Panitch, 2004). Indeed, as one can observe from the institutional history of IP, all major

legal, institutional or semantic innovations that could favor the birth of a strong IP protection regime emerged from the Senate of the United States, heavily under the influence of corporate lobbies, primarily Pharma (Klug, 2008). These are but a few key examples of US-led initiative for the promotion of IP monopolies: the Bayh-Dole Act that allowed by default the exclusive licensing of publicly funded research results by private companies; the establishment of IP as a trade issue and its inclusion by the United States Trade Representative into WTO negotiations with the TRIPs agreement; etc.

This perspective's emphasis on the state apparatus makes it particularly interesting for the study of IP monopolies because the state is decisive to ensure the enforcement of IP monopolies as immaterial property rights.

This explanation for the rise of the current intellectual property regime however is at least partially inaccurate. As mentioned in the first section, the claim that the United States are entirely responsible for the building of the international law of IP is a caricature of reality. If the USTR did play a major role in lobbying for the signature of the TRIPs, the lobbying of a transnational corporate alliance of American but also European and Japanese IP-intensive firms was also necessary in order to convince reluctant countries to sign the TRIPs (Matthews, 2002). The involvement of US vassal countries in order to support American imperialist project.

The Global Imperialist State and Transnational Capitalist Class Perspective

In the last thirty years the new structure of production and accumulation of the world economy has been characterized by the emergence of multinational corporations (MNCs) as leading actors in global economic policy. These MNCs are often the result of giant mergers both within but more importantly across borders, and result in a leveling of certain sectors of corporate interest on a global level. In pharmaceuticals this trend accelerated in the last 10 years with growing collusions between two types of actor that use to be mortal enemies: the Big Pharma corporations and generic producing companies. Cases have multiplied in which Pharmas paid off generic companies in order to deter them from making available the cheapest versions of their generics on the market. Most recently these collusions even took the shape of mergers between western-based pharmaceutical companies and southern generic firms.⁶

This new configuration of pharmaceuticals production and of the global IP regime in general is one a many elements that signal the existence of a transnational capitalist class. The process of globalization leads to a reorganization of class struggle in a transnational manner (as opposed to national or international), whereby the capitalist world economy is more and more organized around the dividing line of transnational capital/transnational labor, hence shifting the focus away from the state, which "is no longer the organizing principle of capitalism and the institutional

6 In 2011 for example, Sun Pharma, an Indian generic company merged with Merck in order to market branded generics in the South. There have also been numerous rumors about the possible merger of Cipla (the largest Indian generic producer) with a big Pharma, which could have catastrophic consequences for public health in the South.

container of class development and social life” (Robinson, 2000). As Chimni (2004) suggests, this transnational capitalist class, the fraction of the world bourgeoisie that represents transnational capital, is building a transnational state as guardian of its power, enforcer of its interests and promoter of its ideology:

“The class which exercises the greatest influence in International Institutions today [i.e. the IFM, the WTO, the World Bank, etc.], and consequently on the emerging global state, is that of the transnational fractions of the national capitalist class in advanced capitalist countries with the now ascendant transnational fractions in the Third World playing the role of junior partners.⁷ Together, they constitute a transnational capitalist class (TCC) which is in the process of congealing and establishing a global state composed of diverse IIs that help actualize and legitimize its world-view. The TCC ‘is comprised of the owners of transnational capital, that is, the group that owns the leading worldwide means of production as embodied principally in the transnational corporations and private financial institutions.” (Chimni, 2004)

This transnational capitalist state based on the political power of finance and rent-bearing capital only represents a small portion of the bourgeoisie and enforces policies that come in direct opposition with a good portion of industrial capital. This divide between sectors of the capitalist class also comes to the fore in the following section on mercantilism and the equation of the interests of financial capital and IP owners with the ‘national interest’.

A Mercantilist and Imperialist System?

This section makes the case that one can define the current IP regime as a mercantilist system in which states, far from losing power against the growing internationalization of economic regulations, put their capacities in service of “their” IP-intensive corporations. The term “mercantilist” is particularly appropriate as it refers to an economic system whose features correspond to most aspects of the current IP regulation system that as seen through the lens of critical political economy. I review here the concept of mercantilism while relating it to current IP regulation and determining its relevance in our understanding of the functioning of the world economy, as well as propose a set of research questions in the field of the critical political economy of IP.

-A nationalist regime

For the purpose of this research agenda, mercantilism can be defined first and foremost as a nationalist system - although nationalism emerges historically long after mercantilism - which is supposed to serve exclusively the interests of the native land. I do not intend here to provide a detailed and faithful history of mercantilist theories and policies.⁷ Instead, I focus here on particular aspects of mercantilism - regardless of their historical significance or adequacy - in order to provide a definition of this economic system that can help us understand the mechanisms

⁷ Mercantilist theorists almost never developed as caricatured an understanding of wealth as Adam Smith made it sound later in his *Wealth of Nations*. Most of them were aware of the importance of the circulation of money and the dynamism of manufacture in the economic wealth of a country. For a critique of Smith’s views on mercantilism and a more accurate account of mercantilist theories, see Heckscher’s *Mercantilism* (1955) and Deyon’s *Le Mercantilisme* (1969).

at work today in the knowledge economy. From a simplistic mercantilist point of view, the sole measure of wealth is the quantity of gold and silver within the borders of a given country:

“If the mercantilist concentrated on encouraging the sale and consumption abroad of native products, he was not thinking of the well-being of foreign consumers, but in accordance with his general approach to the situation, he saw in it an advantage for his own country”. (Heckscher, 1955:13)

Hence, in the 17th and 18th centuries, drawing on the popular concepts of mercantilism, most nations in Europe studied and tried to implement policies whose purpose was to accumulate gold and silver at the expense of other countries through the prohibition of exportation of precious metals first and then the instauration of the monopoly system for the trade with colonies. In *The Wealth of Nations*, Adam Smith harshly criticizes mercantilist policies – not without irony – in order to better illustrate the advantages of the *laissez-faire* system he promotes:

“The laudable motive of all these [mercantile] regulations, is to extend our own manufactures, not by their own improvement, but by the depression of those of all our neighbors, and by putting an end, as much as possible, to the troublesome competition of such odious and disagreeable rivals”. (Smith, 1937:624)

The nationalist drive behind such policies proves to compare quite well with that of recent regulations on IP monopolies: indeed, the current international legislation on intellectual property, far from promoting innovation through competition - as it claims it does - favors a system of monopolies in which foreign firms are prevented to sell a similar product or to do research based on the previous discoveries of others firms. This in turn leads to discussions on the definition of the national interest: in the case of mercantilism, the national interest was served by the abundance of money (under the form of silver or gold) on the national territory, which favored economic activity. Today, the new mercantilism is a system in which states pursue the retaining of intellectual property rents through the strict enforcement of IP monopoly legislations for the sole benefit of ‘their’ IP-intensive corporations. The ‘national interest’ hence seems to be equated with that of a handful of powerful corporations, which raises the question of the definition of the ‘wealth of nations’: what makes a nation wealthy? Is it the amount of profit of its corporation or the living standard of its population? In what ways and to what extent does a corporation “belong” to a state? I believe that the research agenda proposed here would prove useful in providing insight on these questions.

-A corporatist regime

Besides the nationalist elements of mercantilism, Adam Smith characterized it as a system in which “the interest of the consumer is almost constantly sacrificed to that of the producer” (Smith, 1937:625). It is striking how such a definition of the mercantile system reflects the functioning of capitalism if one defines producers more adequately as ‘owners’ and widens ‘consumers’ to ‘proletarians’, especially since the neoliberal counter-revolution and the demise of the welfare-

state. This comparison works particularly well with the functioning of IP regulations, which take as concern the sole interests of the ‘producers’ - or rather the owner of the property title since production per se here is an insignificant step in the process of accumulation - and overlook issues of public health, economic progress or innovation. In fact, Smith’s criticism of mercantilism touches directly upon intellectual property as well:

“Our master manufacturers think it reasonable that they themselves should have the monopoly of the ingenuity of all their countrymen. Though by restraining, in some trades, the number of apprentices which can be employed at one time, and by imposing the necessity of a long apprenticeship in all trades, they endeavor, all of them, to confine the knowledge of their respective employments to as small a number as possible; they are unwilling, however, that any part of this small number should go abroad to instruct foreigners.” (Smith, 1937:625)

Smith here seems to frame and summarize the issue quite accurately: intellectual property is all about state-protected monopoly, because without the monopoly provided with the patent system, the “property of ideas” is meaningless, and maybe more importantly profitless. Hence, this discussion is also related to that on the relative autonomy of the state: to what extent does the state serve the interests of a fraction of the capitalist class? Does the state act as the “executive committee of the capitalist class” or does it benefit from a certain degree of autonomy from the control of the capitalists (here, owners of IP-intensive corporations)? This is not the place for a detailed and empirically grounded answer, however, in most countries state actions seem only loosely connected to corporate IP interests while in the case of the United States, it seemed as if a representative of Pfizer, Microsoft and Monsanto all had a seat next to the USTR during trade negotiations at least from 1979 to 1999. Indeed the current regime, wrought by northern countries through international organizations, fits the interests of IP-based corporations interests almost perfectly. These are often equated with that of the nation because IP firms play now an essential role in counteracting the decline in dynamism of the economies of Northern countries. However, understanding the actions of state representatives in the Uruguay round negotiations as a pure reflection of the interests of their national firms (what Paul Boccara theorized as “state monopoly capitalism”) would constitute an over-simplification, nay a misinterpretation of the situation. The IP regime is highly contested within northern states apparatuses, as shown by the recurrent withdrawals in congress of pro-IP rights bills. It would be more interesting to analyze the construction of the new IP regime as a contested process, a class struggle not only between ‘producers’ and ‘consumers’ as Smith puts it (in other words between capitalists and proletarians), but also between IP monopoly capitalism and competitive capitalism, whose interests regarding the development and implementation of IP regulations are diametrically opposed in most cases.

-An Imperialist Regime

Finally the relation of mercantilism to power - in particular the power of the state but also that of the transnational corporation - makes it an interesting tool in analyzing IP monopolies. When mercantilism was about asserting the state’s power (a) internally through an attempt at

unification, and (b) externally, by imposing trade regulations on other states, the construction of IP protection on a global scale through bilateral and multilateral negotiations constitutes a clear illustration of state power both internal and external, as examined in the first section of this article. Mercantilism is a “system of power”, as Heckscher puts it. He also argues that free trade is no less a system of power since the interest of the motherland is the first concern, and the – purely theoretical – benefits to all nations are merely a side effect of the *laissez-faire* system. However, the difference between mercantilism and free trade as systems of power lies in their respective conception of power: in the case of *laissez-faire*, as a means to gain something else, such as the well-being of the nation; and in the case of mercantilism, as an *end in itself* (Heckscher, 1955:16). Similarly, Adam Smith analyses mercantilism both as a nationalist system and a system of power:

The monopoly raises the rate of profit, but it hinders the sum of profit from rising so high as it otherwise would do. All the original sources of revenue, the wages of labor, the rent of land, and the profits of stock, the monopoly renders much less abundant than they otherwise would be. To promote the little interest of one little order of men in one country, it hurts the interests of all other orders of men in that country, and of all men in all other countries. (Smith, 1937:578)

In *Against Intellectual Monopoly*, Boldrin and Levine (2003) argue, in a manner similar to that of Smith defending free trade against mercantilism, that the current IPR regime, contrary to what its proponents claim, hinders creativity and economic development. If the new mercantile IP regime served initially the interests of a small capitalist class in northern countries – primarily the United States – and was instrumental in avoiding a major crisis with the collapse of northern industrial capital in the 1980s, its forceful extension to southern countries in 1994 with the TRIPs was anything but in agreement with these countries’ or their population’s interests. This regime, in fact, favors trade imbalance between North and South and seems to impose a trade system similar to that of colonial times: instead of exchanging cheap raw materials with expensive finished goods, northern and southern countries now exchange cheap finished goods with expensive ideas (Boldrin & Levine, 2008). This North/South divide widens even deeper when one examines and compares northern and southern patent systems at the national level and the impact the TRIPs had on innovation and IP-based industrial production. With such geographical concentration in IP ownership and global regulations,

“the conditions are given for the globalization process to induce a dualistic world-wide pattern of production organization. In such dual pattern, R&D and engineering activities increasingly will tend to concentrate in developed countries while developing economies will remain ‘locked-in’ in the production of low value added ‘commodities’ as well as in ‘maquila’-type activities” (Aboites & Cimoli, 2002).

The current difficulties encountered in global trade negotiation within the WTO also led scholars to propose a comparison of the emerging trading order with mercantilism, and defines it as transnational mercantilism (Graz, 2004).

In addition to this North/South imperialist exploitation, mercantilism can also be useful

to analyze the rise of what seems to become an inter-imperialist struggle for the control of intellectual property monopolies and the high yield rents associated with them. Recent series of patent lawsuits between electronics companies - each accusing the other of violating its patents⁸ - seem to illustrate this situation accurately. IP-intensive firms, helped by 'their' state and its legal support, compete internationally for the control of immaterial property rights on ideas because their ownership puts them de facto in a monopolist situation in which no other company can produce or sell an identical product for the following 20 years.

As we will see in the conclusion, the three characterizations of the current regime of accumulation of the world economy we have proposed here (US informal empire; transnational capitalist class; mercantilist/imperialist rent accumulation), as illustrated by developments in the regulations of IP monopolies, are not mutually exclusive and can all contribute to explain different spheres of conflicts embedded in the current evolution of the world economy.

Conclusion

This paper aims at pointing directions in which further inquiries into the political economy of IP monopolies and into the new global political economic order could be headed. These directions correspond to three different conflicts at play in the struggle over the new international IP regime: the first one is a conflict between northern states that "own" the overwhelming majority of IPRs in the world economy. The IP-intensive firms based on these states territories, with the help of the state apparatus, compete with other states and "their" IP-intensive firms for the control of IP monopolies and the colossal rents associated with it. The second conflict, which is two fold, is that between IP-intensive capital and competitive capital on the one hand, and between IP-intensive capital and the proletariat. This conflict hence is that of IP capital against the rest of society: behind the smoke screen of immediate and easy profits which is supposed to benefit the whole nation, the pace of research is slowed down, IP-based commodity prices rises and the whole economy slows down to allow a handful of companies to realize super-profits. This conflict obviously is not limited to a particular national territory but runs through borders, and the interest of the transnational class of IP-based capital finds itself in direct opposition to the transnational class of competitive capital on the one hand and the international proletariat on the other. The third conflict is that of the North against the South. One thinks immediately of issues such as access to essential medicines or the control of food crops by northern transnational companies that put in danger the livelihood and the life of millions of peasants and workers of the South. However, these crucial issues constitute only the surface of the much deeper imperialist exploitation of the South by the North, of which IP monopolies is a central element: with IP monopolies highly concentrated in northern/developed countries, and southern countries industries relying on copying foreign technologies for their development (which until now was always part of the process of industrial development). The current global regime of IP accentuates

8 See for example the recent conflict opposing Apple and Samsung over tablets patents.

the global division of labor, in which to put it simply, northern countries exchange cheap finished products and raw materials for expensive ideas. Given these circumstances, it should not come as a surprise that the ideology of IP is being strongly resisted both in the North and the South.

Now, regarding short to medium term prospects for the workings of the world economy and its governance given the conclusions of this paper, one could consider quite likely a continued control of IP monopolies by northern MNCs. In such a situation, not only would these MNCs compete between each other for the control of IP rent, but the structure of the international division of labor would grow much astute, with southern countries producing cheap manufactured goods and northern countries 'producing' (or in some cases capturing) expensive ideas. The WTO, on the other hand, since the failed ministerial meeting of Seattle in 1999 and even more so since Cancún 2003, has been struggling to proceed with the current round of negotiations that has been halted since 2008. It seems that the WTO's combination of coercion and consent and its "negotiable, flexible system of rule" (Chorev & Babb, 2009:22) will not be sufficient to make it sustain (or rather regain) its centrality in global governance. Rather given the state of disarray of international trade negotiations and the growing unrest that accompanies the negotiation and implementation of recent FTAs (ACTA, the Trans-Pacific Partnership, and the Transatlantic Trade and Investment Partnership, all essential in the further strengthening of IP regulations), one can reasonably expect to see the current wave of protectionism and mercantilism - which started with IP in the 1970s under the guise of free-trade - intensify and in the end submerge a brief era of globalization, which, if looking for historical comparison, might bring to mind the first decade of the 20th century.

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